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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/534,133	06/01/2005	Malcolm Tom McKechnie	102792-450 (10477P1)	2800
27389	7590	10/20/2006	EXAMINER	
NORRIS, MCLAUGHLIN & MARCUS 875 THIRD AVE 18TH FLOOR NEW YORK, NY 10022			AHMED, HASAN SYED	
			ART UNIT	PAPER NUMBER
			1615	

DATE MAILED: 10/20/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/534,133

Applicant(s)

MALCOLM MCKECHNIE

Examiner

Hasan S. Ahmed

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-21 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 5/6/05, 5/25/05.

- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_.

### **DETAILED ACTION**

Receipt is acknowledged of applicant's: (a) Information Disclosure Statements filed on 6 May 2005 and 25 May 2005; and (b) letter filed on 1 June 2005.

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#### ***Specification***

The title of the invention is not descriptive. A new title is required that is clearly indicative of the invention to which the claims are directed.

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#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lindauer (U.S. Patent No. 5,139,864) in view of Benko, et. al. (U.S. 2003/0091466).

Lindauer teaches a multilayer volatilizable substance delivery article (see col. 2, line 62 – col. 3, line 18). The disclosed article is comprised of:

- a first phase consisting of a vaporizable agent (i.e. pockets of perfume material) as recited by instant claims 1 and 2 (see col. 9, lines 26-35, figure 11 (107));
- a second phase consisting of a second vaporizable material, as recited by instant claims 1 and 2 (see col. 9, lines 37-43; figure 11 (103));

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- a third phase which constitutes a barrier between the first and second phases, as recited by instant claims 1 and 2 (see col. 9, lines 31-35; figure 11 (101));
- the commencement of vaporization of the second phase being delayed by the third phase and the flowing of the second phase around the third phase, as recited by instant claims 1 and 2 (see col. 7, line 65 – col. 8, line 4; figure 2);
- the shrinking of the third phase, as recited by instant claim 1 (see col. 7, line 65 – col. 8, line 4; figure 2);
- the third phase being the gel, as recited by instant claim 10 (see col. 9, line 37; figure 11 (101));
- the fragrance as recited by instant claim 11 (see col. 2, line 64);
- the insect repellant as recited by instant claim 12 (see col. 2, line 65);
- the third phase being the evaporable agent as recited by instant claim 13 (see col. 7, lines 64-68; figure 2); and
- the third phase being the gel whose volume reduces when exposed to air as recited by instant claim 14 (see col. 7, lines 64-68; figure 2);

Lindauer explains that a multilayer multifunctional volatizable substance delivery article is beneficial because it can deliver different substances (i.e. different aroma profiles) to the environment in a sequentially timed fashion (see col. 2, line 66 – col. 3, line 5).

The Lindauer reference differs from the instant application in that it does not teach the first or second phases to be liquid or gel phases.

Benko, et. al. teach an apparatus for releasing fragrance (see paragraph 0023). The apparatus may comprise multiple liquid or gel phases (see paragraph 0027, figure 3).

The Lindauer reference differs from the instant application in that it does not teach the partition wall of instant claim 1 or the limbs of instant claim 2. However, these limitations are deemed to be a matter of engineering design choice, and thus do not serve to patentably distinguish the claimed subject matter over the prior art. *In re Kuhle*, 526 F. 2d. 553, 188 USPQ 7 (CCPA 1975).

The Lindauer reference is silent with respect to the mixing or migrating of phases recited in instant claims 1 and 2, as well as the evaporation properties of instant claims 3, 4, and 15-21. Applicant's article is the same as the prior art. It contains the same components in the same configuration. Properties are the same when the structure and composition are the same. Thus, burden shifts to applicant to show unexpected results, by declaration or otherwise. *In re Fitzgerald*, 205 USPQ 594. In the alternative, the claimed properties would have been present once the composition was employed in its intended use. *In re Best*, 195 USPQ 433.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to make a vapor releasing article comprising a first phase, a second phase, and a third phase, which constitutes a barrier between the first and second phases, as taught by Lindauer, in view of Benko, et. al. One of ordinary skill in the art at the time the invention was made would have been motivated to make such an

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article because it can deliver different substances (i.e. different aroma profiles) to the environment in a sequentially timed fashion, as explained by Lindauer.

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### ***Correspondence***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Hasan S. Ahmed whose telephone number is 571-272-4792. The examiner can normally be reached on 9am - 5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael P. Woodward can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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